

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMY ELLEN NOWAK,

Defendant-Appellant.

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UNPUBLISHED

June 10, 2014

No. 308232

St. Clair Circuit Court

LC No. 10-002633-FH

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted an order denying her motion to withdraw her guilty plea to first-degree retail fraud, MCL 750.356c. Defendant was sentenced as a habitual fourth offender, MCL 769.12, to three to twenty years' imprisonment. We affirm, but remand for correction of the presentence investigation report (PSIR).

Following oral argument on appeal, this Court remanded the matter to the trial court for an evidentiary hearing, but retained jurisdiction. *People v Nowak*, unpublished order of the Court of Appeals, entered January 30, 2014 (Docket No. 308232). Pursuant to the parties' stipulation, this Court subsequently granted a motion to withdraw defendant's Issues I, II, and V, and rescinded the remand order to conduct the hearing, which was related to those issues. Defendant's two remaining challenges on appeal involve her sentence.

First, defendant argues that the trial court erred in denying her motion for resentencing because she was not sentenced before the same judge who took her plea. She further contends that defense counsel rendered ineffective assistance by failing to object to the fact that the replacement judge presided over sentencing. We disagree.

A defendant is entitled to be sentenced by the same judge who accepted the plea, providing that the judge is reasonably available. *People v Robinson*, 203 Mich App 196, 197; 511 NW2d 713 (1993). Moreover, where the defendant is informed at the plea hearing that a different judge will preside over sentencing and the defendant fails to object, resentencing is not required. *Id.* at 197-198. Because Judge Peter Deegan informed defendant and defense counsel, when the plea was taken, that he would not be presiding over defendant's sentencing, resentencing is not required.

We also conclude that defense counsel was not ineffective for failing to object to the fact that the replacement judge would preside over sentencing. A trial court's factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "To prove defendant received ineffective assistance of counsel, [s]he must show: (1) that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's performance." *People v Roscoe*, 303 Mich App 633, \_\_\_; \_\_\_ NW2d \_\_\_ (2014), slip op at 3. Defense counsel possesses "'wide discretion in matters of trial strategy,'" *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013), quoting *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and defendant must provide evidentiary support overcoming the presumption of trial strategy and excluding "hypotheses consistent with the view that [her] trial lawyer represented [her] adequately." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has provided no evidentiary support to overcome the presumption of strategy in defense counsel's decision not to object to a replacement judge presiding over sentencing. Although defendant argues that Judge Deegan's familiarity with her parole history would have been "significant" at sentencing, she cannot establish that that knowledge (including the fact that defendant was on parole for murder and kidnapping when she committed the instant offense) would have resulted in a lesser punishment.

Second, defendant argues that her PSIR contained numerous inaccuracies requiring resentencing or correction of the PSIR. Alleged inaccuracies on appeal include: (1) the portrayal in the Evaluation and Plan that defendant is unable to be rehabilitated ("sense of entitlement"), (2) the reference to defendant's "early release" in the Evaluation and Plan, (3) the reference to defendant as a "high school dropout" in the Evaluation and Plan, (4) the statement in the Criminal Justice, Adult History that defendant left a murder victim in a trunk for a "couple of days" rather than one day, (5) the statement in the Family description that defendant "feels bad that she did not see [her father] prior to his death," and (6) statements in the Finances and Liabilities sections about a settlement award and truck payments.

Rulings on claimed inaccuracies in the PSIR are reviewed for an abuse of discretion, *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003), and again, factual findings are reviewed for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013); see *LeBlanc*, 465 Mich at 579.

MCR 6.425(E)(2) provides as follows regarding challenges to the PSIR:

Resolution of Challenges. If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

MCL 771.14(6) also requires the trial court to correct inaccurate PSIR information at the time of sentencing.

In *People v Spanke*, 254 Mich App 642, 648-649; 658 NW2d 504 (2003), this Court explained that a trial court has "wide latitude in responding" to challenges to the accuracy of information in the PSIR. Where a statement in the PSIR that the defendant "appeared to be in denial" was the "the opinion of the investigating officer, not a statement of fact," it did not need to be stricken from the report. *Id.* at 649. Similarly, here, the record reflects that the trial court found the probation officer's statement in the Evaluation and Plan that defendant "exhibits a sense of entitlement," which was supported by statements that she "lived a very non-productive, self-absorbed lifestyle," was a "drain on society," and did not benefit "from her early release from prison," were opinions, not facts. The trial court's finding did not amount to clear error and it was not an abuse of discretion to refuse to strike the statements from defendant's PSIR.

Defendant also claims that the use of the phrase "early release" was inaccurate because under Michigan's truth-in-sentencing laws, a defendant is required to serve all minimum sentences prior to any possibility of parole; "early release" from good-time or disciplinary credits was not available to her. But because defendant was paroled after 20 years for offenses, including kidnapping for which she was sentenced 20 to 50 years, she could have been imprisoned longer before she was paroled (the prosecutor had argued that paroling her so early was a mistake). Thus, in this sense, the use of the phrase "early release" was not inaccurate and need not have been stricken from the PSIR.

Likewise, the reference to defendant as a "high school dropout" in the Evaluation and Plan was not inaccurate. Defendant claims she did not drop out, but could not finish high school because she was arrested. The trial court did not clearly err by finding that this is "a distinction without a difference" and the reference need not have been stricken.

The trial court found the following statements immaterial to the sentence, but did not omit them from the PSIR: the duration of time defendant left her murder victim in a trunk, that defendant "feels bad that she did not see [her father] prior to his death," the duration lawsuit settlement payments will continue, and defendant's total liability and weekly payments for a truck. We remand for the correction of the PSIR, omitting these statements that the trial court did not take into account in sentencing defendant. MCR 6.425(E)(2)(a).

We affirm, but remand for correction of the PSIR. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Kathleen Jansen  
/s/ Kurtis T. Wilder